82-1775

NO.

IN THE

Supreme Court of the United States

October Term 1982

BILLY G. CHAMBERS, JR., et al.,

Petitioners,

v.

McLEAN TRUCKING COMPANY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

B. Ervin Brown, II, Esquire
BADGETT, CALAWAY, PHILLIPS,
DAVIS,STEPHENS, PEED & BROWN
200 West First Street
Winston-Salem, NC 27101

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

Beverly C. Moore,Jr., Esquire
6900 Wisconsin Avenue
Suite 305
Bethesda, MD 20815

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the decision of the trial court to allow the union to unilaterally pursue successful classwide grievances on behalf of the casual employees of Roadway, Branch and Pilot, but not doing the same for the McLean and Spector casuals, is discriminatory, arbitrary and contradicts principles announced by this court in Vaca v. Sipes.

2. Whether the district court's limiting the scope of the certified class to employees within the geographical jurisdiction of local 391 only creates serious inefficiencies for class action remedies in breach of duty cases, and is in conflict with decisions from other jurisdictions.

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Billy G. Chambers and John Angell, on behalf of themselves and the certified class which they represent, respectfully petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the

Fourth Circuit entered in this case on February 2, 1983.

OPINIONS BELOW

The Judgment of the District Court is now reported at 550 F. Supp. 1335 (M.D.N.C. 1883) and is printed herein as Appendix A. The opinion of the Court of Appeals is unpublished and is printed herein as Appendix B.

JURISDICTION

The Court below entered Judgment on February 2, 1983, Appendix B. This Court has jurisdiction, pursuant to 28 U.S.C. §1254(1), to review the Judgment of the Court of Appeals by Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a) provides:

> (a) Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor

organizations, may be brought in any District Court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 23(a) of the Federal Rules of Civil Procedure provides:

(a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) The class is so numerous that joinder of all members is impracticable,

(2) There are questions of law or fact common to the class,

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) The representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3), Federal Rules of Civil Procedure, provides:

(b) Class actions maintainable. An action may be maintained as a class action if the prerequesites of subdivision (a) are satisfied, and in addition:

(3) The Court finds that the questions of lawor fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) The interests of members of the class in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) The difficulties likely to be encountered in the management of a class action.

Rule 56(c), Federal Rules of Civil Procedure, provides:

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the date of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

(a) The Parties

Petitioners Billy G. Chambers ("Chambers") and John William Angell ("Angell") were employed as casuals[1/] by respondent McLean Trucking Company ("McLean") at various times between April 1, 1976, and March 31, 1979. During the same period Angell was also employed as a casual by respondent Spector Red Ball, Inc. ("Spector").

[1/] "Casuals" were part-time truck terminal dock workers who essentially worked full time even though they were technically called on an "as needed" basis. Most casuals, including petitioners, were not dues-paying union members.

As such the petitioners were covered by the provisions of the National Master Freight Agreement and, during the period May 30, 1976, through March 31, 1979, by the provisions of the Carolina Freight Council City Cartage Supplemental Agreement. Signatories to both Agreements included the International Brotherhood of Teamsters ("IBT") and respondents McLean and Spector. The Supplemental Agreement was signed on behalf of the IBT by the relevant local unions in each geographic area, including with respect to petitioners respondent IBT Local 391 ("Local 391"). Respondent Eastern Conference of Teamsters ("Eastern Conference") is an unincorporated labor association or organization which provides support, including legal and research service, to the affiliated local unions (including Local 391) which constitute its membership.

(b) The Facts

Petitioners alleged that McLean and Spector had failed and refused to pay them and other casuals the additional $.50 per hour called for by Article 53 of the Supplemental Agreement,[2/] and that Local 391 and other IBT entities breached their duty of fair representation by failing fairly and adequately to represent them in the ensuing grievance process, while at the same time successfully invoking the grievance process to obtain full recompense for casuals who had not been paid the extra $.50 per hour by three other employers who were signatories to the Supplemental Agreement.

[2/] Article 53: "Effective May 30, 1976, the Employer shall pay casual employees $.50 per hour, in addition to the hourly rate, for time worked, not to exceed $4.00 per day so as to provide their own health and welfare insurance coverage. This payment shall not be subject to overtime, and shall not be required if the health and welfare contributions established by the Supplemental Agreement...have been paid on his behalf, or if health insurance is provided as interpreted by the National Committee."

On cross motions for summary judgment the uncontradicted evidence showed that: Local 391 and the other North and South Carolina IBT locals that were signatories to the Supplemental Agreement knew that a substantial number of trucking companies covered by the Supplemental Agreement were refusing to pay the additional $.50 per hour; that in June and July of 1976 Local 391 itself initiated grievances on a "shotgun" or classwide basis on behalf of all casuals employed by three of the companies,[3/] but that prior to March 10, 1977, neither Local 391 nor any of the other five locals who were signatories to the Supplemental Agreement filed a similar grievance against McLean or Spector, despite

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[3/] Roadway, Branchway, and Pilot Trucking Companies. One of the two grievances filed gainst Pilot was initiated by complaints filed by six named casuals; the other Pilot grievance, as well as the grievances against Roadway and Branch, were initiated by Local 391 itself through a union business agent.

the fact that one Joe Ellen, a casual employee of McLean, lodged a classwide complaint with Local 391 in June of 1976; and that prior to March 10, 1977, two or three casuals had filed complaints against Spector with IBT Local 28 in South Carolina; that thereafter in July or August of 1976, McLean commenced payment of the $.50 per hour to the 11 "preferential" employees, including Ellen, but continued until January, 1977, to decline payment to the 700 plus[4/] "regular" casual employees; that Spector continued to decline payment throughout the life of the Supplemental Agreement.

[4/] McLean employed more than 700 regular casuals within the jurisdiction of Local 391 alone. Due to the trial court's denial of plaintiffs' motion to compel discovery, plaintiffs never learned the total number of regular casuals employed by McLean at all six of the North and South Carolina IBT locals.

Rather than filing grievances on behalf of these unpaid employees, the Carolina Supplemental Negotiating Committee, chaired by the Local 391 President and representing all IBT locals in North and South Carolina, had agreed to hold the matter "in abeyance" for nine months while "awaiting Guidelines from the National Grievance Committee." Those "Guidelines" (Appendix C) were issued on March 2, 1977, "in settlement of" the deadlocked grievances involving Branch, Roadway, and Pilot. Casual employees of these companies in Virginia, North Carolina and South Carolina were paid the $.50 per hour retroactive to May 30, 1976, the beginning date of the contract, pursuant to paragraph 1 of the Guidelines. Thereafter, both the union and the employers interpreted the Guidelines as meaning that no one would be paid retroactive to May 30, 1976,

unless a complaint had been filed on his behalf on or before March 10, 1977. [5/] The President of Local 391 characterized the deadline as follows: "So far as I know March 10 was just an arbitrary deadline based on those people who could get it back to May 30." (Emphasis added).

Moreover, no "deadline" was ever mentioned by the union or employers until May 2, 1977, the date on which the Administrative Assistant for the Eastern Conference, Mr. Robert Flynn, sent a telegram to the President of Local

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[5/] Pursuant to the Guidelines the Local 391 President posted a "Notice", as presumably did the other locals, dated April 4, 1977, in all terminals of all trucking companies within Local 391's geographic confines advising all casual employees of the Guidelines. The Notice was, of course, posted after the passage of the "deadline". In light of the "deadline", plaintiffs' complaints against McLean and Spector on May 27 and March 8 respectively, were denied as "untimely".

391--with copies to the trucking companies' representative--establishing the March 10 "deadline" for the first time. Indeed, the transcripts of hearings before the Bi-State Grievance Committee made no mention of the "deadline" prior to the June 14, 1977, hearing in Local v. Pilot (Laurinburg Terminal), when the May 2 Flynn telegram was first read into the record.

But between March 2, 1977, the date on which the Guidelines were adopted, and May 2, 1977, the date of the Flynn telegram, there was considerable correspondence between Flynn and Local 391 regarding payment of the $.50 per hour. On March 25, 1977, the Local 391 President (R.V. Durham) wrote Flynn that

> [b]ecause of the long delay (almost a year) we are now facing possible litigation from the part-time employees because of the carriers' refusal to pay and the failure of the Unions to force payment. I cannot emphasize the importance of clearing the matter up as soon as possible. [Emphasis added].

And on April 20, 1977, Durham again complained to Flynn that

> [w]e are not talking about small change, but a substantial amount...As you can appreciate, we are sitting on a time-bomb. Here are employees who have up to $800.00 in retroactive wages being told they will not receive their pay because their agent filed a [shotgun] grievance on their behalf. This has to be cleared up as quickly as possible.

Only after receipt of the foregoing correspondence did Flynn send the May 2 telegram which established the March 10 "deadline."

(c) The Judgment in the District Court

Following cross motions for summary judgment[6/] the trial court issued its Memorandum Opinion and Order denying

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6/ Plaintiffs moved for partial summary judgment only on the issue of liability.

plaintiffs' summary judgment motion and indicating that it would grant defendant's motion after plaintiffs had given notice of class action pendency[7/] pursuant to Rule 23(c)(2) and any class members who so desired had opted out of the class. Defendants' motion for summary judgment was granted on March 16, 1982, and an Order of dismissal was entered.

The justifications for the District Court's conclusion that there had been no breach of duty on the part of the defendant unions may be categorized as follows. First, even though pre-March 10, 1977, classwide grievances had been filed by other casuals with Local 391 against McLean and with Local 28 against

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[7/] Plaintiffs had requested a class of all McLean and Spector casuals in North and South Carolina who were not paid the $.50 per hour. The court certified a class of unpaid casuals within Local 391's jurisdiction only.

Spector, the plaintiffs in this case, though members of the same class as the casuals who filed the pre-March 10, 1977, complaints, could not use the "fortuity" of the earlier complaints to "bootstrap" them into excusing their own failures to exhaust their administrative remedies prior to March 10, 1977. Second, absent a complaint from one or more employees, no local union had a duty to grieve on behalf of McLean and Spector casuals at any time, even though the locals knew of the nonpayments and had prosecuted three pre-March 10 grievances against Roadway, Branch and Pilot without naming any individual employee complainants. Third, since the $.50 per hour payment was not a "wage" but a fringe benefit, plaintiffs were bound by Article 44, §4 of the Supplemental Agreement, for a 10-day limitations period on providing non-wage

grievances,[8] even though, regardless of whether the $.50 per hour payments were or were not "wages", they were certainly treated as such for the pre-March 10 Roadway, Branch and Pilot grievances[9], which resulted in

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[8] Article 44, §4 provided: All grievances must be made known to the other party, in writing, within ten (10) days after the reason for such greivance has occurred...If unable to settle such grievance within a total of twenty (20) days after reason for such grievance has occurred, such grievance must be reduced to writing and submitted to the Employer and Chairmen of the Bi-State Grievance Committee or the complaint will be automatically voided, except where there is a proven violation of wage provisions in this contract. Wage provisions are interpreted to mean...the hourly rate (including the overtime rate). [emphasis added]

[9] Moreover, the United States Department of Labor conducted an "on-site" investigation and thereafter concluded that the $.50 per hour payment was a "wage" and not a fringe benefit.

payment retroactive to May 30, 1976. Fourth, plaintiffs were not "duped" or otherwise subjected to arbitrary or discriminatory treatment by not receiving notice of the March 10 deadline until after that deadline had passed. Fifth, the Flynn telegram establishing the March 10 deadline for non-waiver of the 10-day rule did not improperly influence the Bi-State Grievance Committee's decision to reject Chambers' grievance.[10/]

(d) The Fourth Circuit's Decision

On appeal the United States Court of Appeals for the Fourth Circuit issued a one-half page unpublished per curiam opinion affirming the judgment of the District Court "on the reasoning of the District Court."

[10/] This Court need only grant the Writ with respect to the first two of the five District Court's conclusions listed in the text to resolve the merits of the breach of duty claim.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the District Court[11/] that it was not a breach of their duty of fair representation for the union entities to knowingly invoke the grievance process to enforce the extra $.50 per hour payments requested for employees of some companies, but not for employees of other companies, condones arbitrary and discriminatory union conduct and directly conflicts with principles this Court announced in Vaca v. Sipes, 386 U.S. 171 (1967), as well as decisions from other Circuits and the Fourth Circuit.

The Fourth Circuit's affirmance of the District Court's decision is based on a serious

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11/ Because the per curiam affirmance by the Fourth Circuit was based entirely on the reasoning of the trial court, all references herein are to the Memorandum Opinion and Order of the District Court, unless otherwise indicated.

misapprehension of the nature and scope of the issues before that court. Although the gravamen of the plaintiffs' complaint is that they were treated in an arbitrary and discriminatory fashion by their union, the Fourth Circuit erroneously concluded that "[t]he gravamen of the plaintiffs' complaint is that the defendant employers and union entities conspired to deprive them of certain hourly payments...". Because the Fourth Circuit's judgment imposes irreparable and unwarranted harm on petitioners, this court should exercise its supervisory powers to correct a manifest injustice.

This court has stated that unfair representation actions further a significant goal of national labor policy--the peaceful, swift resolution of labor grievances through contractual means--by encouraging good faith

and diligent efforts by a union on behalf of its members. The District Court's decision undermines that goal by holding a union unaccountable for the damages caused covered employees by the union's callous and reckless handling of their grievances.

Finally, the District Court's limiting the scope of the certified class to employees within the geographical jurisdiction of Local 391, thus excluding casuals within the jurisdictions of the five other North and South Carolina locals who were signatories of the same Supplemental Agreement calling for the extra $.50 per hour, potentially creates serious inefficiencies for class action remedies in breach of duty cases. For the District Court's holding would require the filing of six separate class actions--one on behalf of employees at each local--when one

class action on behalf of all employees covered by the Agreement could resolve the entire controversy.[12/]

REASONS FOR GRANTING THE WRIT

(a) The Decision of the Trial Court to Allow the Union to Unilaterally Pursue Successful Classwide Grievances on Behalf of the Casual Employees of Roadway, Branch and

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[12/] Moreover, in limiting the scope of the class on this latter basis, the District Court impermissably allowed the merits to intrude into its ruling, in contravention of this Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). On a motion for class certification petitioners were not required to prove that each local actually did have knowledge of McLean's and Spector's nonpayments. Rather, plaintiffs were required to establish only that the issue of the locals' knowledge was susceptible to being adjudicated at trial on a classwide basis. Since petitioners allege that they could have presented evidence at trial that all of the locals were aware of the nonpayments, the District Court erred in excluding five locals from the class on the basis of the District Court's own merits assumption that such knowledge could not be established.

Pilot, But Not Doing the Same for the McLean and Spector Casuals, is Discriminatory, Arbitrary and Contradicts Principles Announced by this Court in Vaca v. Sipes.

The most succinct description of the union's arbitrary and discriminatory treatment of the McLean and Spector casuals' contractual entitlement to the extra $.50 per hour payments was given by the District Judge himself in a May 29, 1981, Memorandum (App. D):

> [T]he Court is troubled by the failure of Local 391 to grieve concerning the $.50 provision before March 10, 1977.If plaintiffs' suit has merit, this failure seems to provide its basis. If Local 391 had filed grievances against McLean and Spector by March 10, 1977, presumably the union and employers would have settled those grievances in the same manner as the other grievances before the National Grievance Committee at that time

--i.e., the full retroactive payment that was received by all casuals employed in North or South Carolina by Roadway, Branch and Pilot.

Wholly apart from the issue of whether the unions, in the absence of actual complaints by individual employees, had a duty to initiate grievances sua sponte on behalf of petitioners and their class, the District Court's holding that Chambers and Angell could not avail themselves of the pre-March 10, 1977, Ellen and Local 28 complaints is squarely contradicted by such decisions of this Court as Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980); Romasanta v. United Air Lines, Inc., 537 F.2d 915 (7th Cir. 1976), aff'd sub nom. United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), sub nom. McDonald v. United Air Lines, Inc., 587 F.2d 357, 360-361 (7th Cir. 1978); and American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).

Just as in Roper, the pre-March 10, 1977,

complaints here were "bought off" by the satisfaction of their individual claims. However, that did not moot their classwide claims or negate the local unions' knowledge, based in part on those complaints, that petitioners and their class were not being paid the extra $.50 per hour. And as in McDonald, petitioners were entitled to intervene with their subsequent complaints as substitute class representatives for the pre-March 10, 1977 complainants, any applicable limitations period meanwhile being tolled under the rationale of Amercian Pipe.

Moreover, aside from whether petitioners could have relied upon the pre-March 10, 1977, complaints for purposes of satisfying their own exhaustion requirements, this case raises important questions concerning a union's duty to unilaterally invoke the grievance process. Petitioners never contended that a union has a

duty sua sponte to invoke the grievance machinery when the union has no knowledge that an employer is not complying with a collective bargaining agreement and no individual employee brings such noncomplaince to the union's attention by filing a complaint. Rather, the primary issue here is whether the union breached its duty by unilaterally pursuing successful classwide grievances on behalf of the casual employees of Roadway, Branch and Pilot but not doing the same for the McLean and Spector casuals whom the unions knew were also not being paid the extra $.50 per hour. Just as the attorney who sits on his client's claim until after the statute of limitations has expired is guilty of malpractice, the unions' championing of the Roadway, Branch and Pilot casuals' claims while sitting on the rights of the McLean and Spector casuals amounts to the arbitrary or discriminatory treatment that constitutes breach of the duty of fair

representation. Secondarily, it is undisputed that those who filed grievances after March 10, 1977 were treated differently than those who grieved prior thereto, i.e., while according to the trial court's interpretation of Article 44, §4 both pre- and post-March 10 grievants were subject to the 10-day rule, the rule was waived for the former but not for the latter, who were thereby restricted to 10 days retroactive pay as opposed to pay retroactive to the beginning date of the contract.

In Vaca v. Sipes, 386 U.S. 171 (1967), this Court made repeated references to "arbitrary"[13/] union conduct as

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13/ As discussed supra, p.11 n.5, the Local 391 President characterized March 10 as "just an arbitrary deadline." Cf., Clayton v. International Union, 451 U.S. 679, 693 n.23 (1981) (union's admission that it breached its duty of fair representation is evidence the court can consider even though the employer would be entitled to prove that no such breach had occurred.)

constituting a breach of the union's duty. The Court held that it was incumbent on a union

> to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. 386 U.S. at 177 [emphasis added].

The Court stated further that union conduct breaches the duty of fair representation when it is "arbitrary, discriminatory or in bad faith". 386 U.S. at 190 [emphasis added].

Following the decision in Vaca and in Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971), the decided trend has been that mere arbitrary conduct by the union in representing those within a particular bargaining unit consititutes a breach of that union's duty. Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Harrison v. United Transportation Union, 530 F.2d 558, 561 (4th Cir. 1975); Wyatt v. Interstate & Ocean

Transport, 623 F.2d 888 (4th Cir. 1980); Retana v. Apartment, Motel, Hotel & Elevator Operators Union Local 14, 453 F.2d 1018, 1023 n.8 (9th Cir. 1972) ("the Vaca opinion's repeated reference to 'arbitrary' union conduct reflects a calculated broadening of the fair representation standard"); Beriault v. Local 40, Super Cargoes & Checkers of I.L. & W.U., 501 F.2d 258, 263-264 (9th Cir. 1974); Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973); Woods v. North American Rockwell Corp., 480 F.2d 644, 648 (10th Cir. 1973); Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1083, 1089-1090 (9th Cir. 1978) (duty is breached where union's acts or omissions reflect reckless disregard of the rights of particular employees); Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975) (mere negligent failure to act which has arbitrary or discriminatory result may

constitute breach of duty).

In the instant case, the arbitrary nature of the union's conduct is apparent: although aware that McLean and Spector were not paying the additional $.50 per hour, the union chose to hold the matter in "abeyance" until such time as the National Grievance Committee issued "Guidelines". After issuance of the Guidelines, the union took the position that future grievances for retroactive pay to the beginning date of the contract would be denied as "untimely".

The only rationale advanced by the trial court to justify such obviously disparate treatment was as follows:

> Employees who were not covered by pre-March 10, 1977, grievances have no reason to complain if they failed to attempt to exhaust their remedies under the collective bargaining agreement.

As discussed supra, p.11 n.5, plaintiffs did attempt to exhaust, albeit after the

"deadline".[14/] More importantly, however, the District Court's application of the exhaustion doctrine directly conflicts with this Court's holding in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976).

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of finality provisions of the contract.

And see Lusk v. Eastern Products, 427 F.2d 705, 708 (4th Cir. 1970):

> Where an employee member of a union bases his case upon a conspiracy or an illegal combination between his union and his employer to deprive him of his rights he cannot be forced to submit that issue to arbitration between the employer and the union since such procedure would entrust representation of the complaining employee to the very union which he

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[14/] Moreover, under plaintiffs theory, they were covered by the classwide pre-March 10 Ellen complaint, as discussed supra at 23-24.

> claims refused him fair representation and because it would present as adversaries in the arbitration proceeding the two parties charged by the employee with combining to defraud him.

Alternatively, given the union's decision to hold further grievances "in abeyance", the District Court's application of the exhaustion doctrine runs afoul of the settled law of this Court that exhaustion will not be required if futile. Hines, supra, 424 U.S. at 563; Vaca v. Sipes, supra, 386 U.S. at 184-186.

(b) The District Court's Limiting the Scope of the Certified Class to Employees Within the Geographical Jurisdiction of Local 391 only Creates Serious Inefficiencies for Class Action Remedies in Breach of Duty Cases, and is in Conflict With Decisions From Other Jurisdictions.

The District Court's limiting the scope of the certified class to employees within the geographical jurisdiction of Local 391, thus excluding casuals within the jurisdictions of

the five other North and South Carolina locals who were signatories of the same Supplemental Agreement calling for the extra $.50 per hour, potentially creates serious inefficiencies for class action remedies in breach of duty cases. For the District Court's holding would require the filing of six separate class actions--one on behalf of employees at each local--when one class action on behalf of all employees covered by the Agreement could resolve the entire controversy.

Indeed, the grievances pursued by Local 391 on behalf of the Roadway, Branch and Pilot casuals resulted in full retroactive payment of all casuals employed by those companies anywhere in North or South Carolina--not just those casuals employed within Local 391's jurisdiction. Thus, whatever jurisdictional limitations there might have normally been on the scope of an IBT local's grievance, to limit

the scope of the certified class here to anything less than the entire North and South Carolina area covered by the Supplemental Agreement would again result in McLean and Spector casuals employed outside of Local 391's jurisdiction being treated arbitrarily and discriminatorily vis-a-vis similarly situated Roadway, Branch and Pilot casuals.

In the context of this case, just as the District Court would not have required each Local 391 casual to have individually exhausted his administrative remedies, it had no basis for requiring separate exhaustion at each Local. The fact that all of the locals were "juridically linked" as signatories to the same Supplemental Agreement provides ample nexus to justify inclusion of all of their casuals in the class. See LaMar v. H & B Novelty & Loan Co., 489 F.2d 461, 469-470 (9th Cir. 1973); Hopson v. Schilling, 418 F. Supp. 1223, 1238

(N.D. 1976); In re Northern District of California "Dalkon Shield" Products Liability Litigation, 526 F. Supp. 887, 900-901 (N.D. Cal. 1981).

Closely analogous to the situation here was that presented in United States v. Trucking Employers, Inc., 75 F.R.D. 682, 685 (D.D.C. 1977). As described in In re Itel Securities Litigation, 89 F.R.D. 104, 122 (N.D. Cal 1981), which also supports petitioners' position, Trucking Employers held that

> certification of the defendant class was appropriate in an action brought by minority workers to enjoin discriminatory practices of the trucking industry and to recover back pay for the employees discriminated against. The defendant class consisted of those trucking companies who are parties to or bound by the National Master Freight Agreement...In finding the Rule 23(a) prerequisites met the court stated:
>
> > It must be emphasized that this is not simply a case in which the plaintiffs have attempted to lump together numerous unrelated or superficially-related firms on the theory that all of them engage in

> employment discrimination. In such cases a court might well conclude that any commonality is no more than illusion and is insufficient to justify class treatment. Here, each member of the defendant class provided an identical service, requires employees who possess identical skills, and utilizes identical job classifications. Perhaps most telling, each is party to the National Master Freight Agreement or its area supplements. These agreements bind the employment practices of the entire class in certain crucial respects...First, the agreements delimit the defendant class. Indeed, this bond between the class members suggests to the Court that in a practical sense they themselves have elected to become a "class." Second, the legality of certain provisions of these agreements is at issue in this case...[75 F.R.D] at 690 [emphasis supplied]. The Court concluded that "under these circumstances" the defendants are juridically related in a manner that suggests a resolution of the entire dispute would be expeditious, citing LaMar [emphasis added].

Though Trucking Employees and Itel involved the issue of whether defendants with whom plaintiffs had no privity relationship could be included in a proposed defendant class, the

same principles control here where the issue is whether casual employees at all locals that were signatories to but failed to enforce the same Supplemental Agreement may be included in the class. In short, since exhaustion at one local is sufficient for all, lack of evidence of attempts to exhaust at locals other than 391 does not render the claims of Local 391 casuals atypical under Rule 23(a)(3), as the District Court impliedly held.

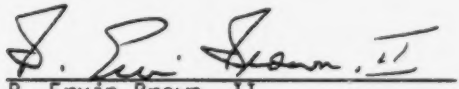
As for the District Court's conclusion that insufficient evidence had been presented that each local was aware that McLean and Spector were not paying the extra $.50 per hour, the record shows quite clearly that the Supplemental Negotiating Comittee, which represented all of the locals in North and South Carolina, conducted a "dialogue" with the employers involving "numerous contacts" and agreed to hold the matter of nonpayment "in abeyance"--meaning that no further grievances

would be filed by any of the Locals.

CONCLUSION

For the reasons heretofore stated, petitioners request that this matter be reversed and remanded with appropriate instructions.

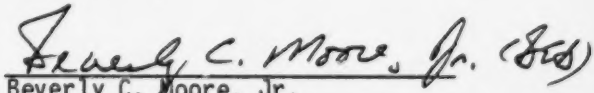
Respectfully submitted,



B. Ervin Brown, II
Counsel for Petitioners

OF COUNSEL:

BADGETT, CALAWAY, PHILLIPS, DAVIS,
STEPHENS, PEED and BROWN
200 West First Street
Winston-Salem, North Carolina 27101
Telephone: (919) 724-3821



Beverly C. Moore, Jr.
Counsel for Petitioners

6900 Wisconsin Avenue
Suite 305
Bethesda, Maryland 20815
Telephone: (301) 654-7073

I, B. Ervin Brown, II, an attorney in the office of BADGETT, CALAWAY, PHILLIPS, DAVIS, STEPHENS, PEED and BROWN, attorneys of record for Petitioners herein, depose and say that on the 29th day of April 1983, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT on:

F. William Kirby, Esquire
McCaul, Grigsby and Pearsall
320 Mutual Building
Richmond, Virginia 23204

Hugh J. Beins, Esquire
Beins, Axelrod & Osborne, P.A.
Suite 300, Investment Building
1511 K Street, N.W.
Washington, DC 20005

Norman B. Smith, Esquire
Smith, Patterson, Follin, Curtis, James and Harkavy
704 Southeastern Building
Greensboro, North Carolina 27401

Claude Hamrick, Esquire
Post Office Box 213
Winston-Salem, North Carolina 27102

counsel of record for said Respondents.

B. Ervin Brown, II

Subscribed and sworn to
before me, this the 29th
day of April, 1983.

Notary Public

My Commission Expires: November 9, 1983

OFFICIAL SEAL
Notary Public, North Carolina
County of Forsyth
PEGGY T. INCH
My commission expires Nov. 9, 1983

Billy G. CHAMBERS, Jr., and John William Angell, Jr., on behalf of themselves and all other persons similarly situated, Plaintiffs,

v.

McLEAN TRUCKING COMPANY, INC., Spector Freight Systems, Inc. and International Brotherhood of Teamsters, Local Union No. 391, Defendants.

No. C-79-388-WS.

United States District Court, M.D. North Carolina, Winston-Salem Division.

Sept. 25, 1981.

Order of Dismissal March 15, 1982.

Employees brought action against their employers for breach of collective bargaining agreement and against their union local for breach of the duty of fair representation. On various pretrial motions, the District Court, Hiram H. Ward, Chief Judge, held that: (1) employees' claim that union local breached its duty of fair representation in a manner which caused grievance committee to deny employees' grievance against employer was time barred; (2) employees' claim that union local breached its duty of fair representation by failing to file grievances against employers was not time barred; and (3) provision of supplemental collective bargaining agreement requiring employers to pay casual employees an additional 50¢ per hour in lieu of health and welfare insurance coverage was a health and welfare provision, not a wage provision, and, thus, provision of the collective bargaining agreement requiring grievances to be filed within ten days after occurrence of the reason for the grievance was applicable and employees, who were not paid the additional 50¢ per hour, were limited to recovery for the period beginning ten days before employers received written notice of their complaints.

Order accordingly.

1. **Labor Relations** ⇐768, 778

Punitive damages were not recoverable in action by employees against their employers for breach of their collective bargaining agreement and against their union local for breach of the duty of fair representation. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

2. **Federal Civil Procedure** ⇐2538

Affidavits in support of summary judgment motion would not be stricken in their entirety merely because they contained a few statements as to the affiants' understandings rather than knowledge. Fed. Rules Civ.Proc.Rule 56, 28 U.S.C.A.

3. **Federal Civil Procedure** ⇐2533

Where district court received and considered matters outside the pleadings with reference to defendants' motions to dismiss or, in the alternative, for summary judgment, it would treat those motions purely as ones for summary judgment. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

4. **Federal Civil Procedure** ⇐2547

Although both sides to case had moved for summary judgment, district court could deny judgment to all parties if warranted. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

5. **Labor Relations** ⇐758

Employees' claim that union local breached its duty of fair representation in a manner which caused grievance committee to deny employees' grievance against employer was time barred under North Carolina statute requiring an application to vacate an arbitration award to be made within 90 days after delivery of a copy of the award. N.C.G.S. § 1-567.13(b); Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

6. **Labor Relations** ⇐758

Employees' claim that union local breached its duty of fair representation by failing to file grievances against employers was not time barred, where suit was brought within three years of the effective date of the provision of the supplemental collective bargaining agreement upon which

the grievance was based. N.C.G.S. § 1-52; Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

7. Labor Relations ⇐219

Union breaches its duty of fair representation whenever its conduct is arbitrary, discriminatory or in bad faith. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

8. Labor Relations ⇐221

If a union, in collusion with an employer or otherwise, acted so as to create a procedural bar, not provided for in the relevant contract, to the assertion of certain rights by employees, such conduct would violate the union's duty of fair representation. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

9. Labor Relations ⇐463

Provision of supplemental collective bargaining agreement requiring employer to pay casual employees an additional 50¢ per hour in lieu of health and welfare insurance coverage was a health and welfare provision, not a wage provision, and, thus, provision of the collective bargaining agreement requiring grievances to be filed within ten days after occurrence of the reason for their grievance was applicable and employees, who were not paid the additional 50¢ per hour, were limited to recovering for the period beginning ten days before employer received written notice of their complaint.

10. Labor Relations ⇐416.1

Individuals who sue their employers for breach of a collective bargaining agreement must first attempt exhaustion of remedies under that agreement.

11. Labor Relations ⇐416.1, 416.3

Exceptions to the principle that individuals who sue their employers for breach of a collective bargaining agreement must first attempt exhaustion of remedies under that agreement arise when the employer repudiates the agreement, the union refuses to process a complaint, or the exhaustion attempt is futile.

12. Labor Relations ⇐416.3

Union local's mere failure to follow up on grievance allegedly filed by employee, without more, was not sufficient to exempt employees from the requirement of exhaustion of remedies under the collective bargaining agreement.

13. Labor Relations ⇐221

Neither union local nor any other union entity breached its duty of fair representation by failing to process grievances against employers on its own initiative. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

14. Federal Civil Procedure ⇐172

Class certification would not be denied on grounds that the motion for certification was untimely, absent a showing of prejudice. Fed.Rules Civ.Proc.Rule 23(a), (b)(3), 28 U.S.C.A.

15. Federal Civil Procedure ⇐172

On motion for class certification, district court could preliminarily look at the evidence presented to see if a class action was properly maintainable. Fed.Rules Civ. Proc.Rule 23(a), (b)(3), 28 U.S.C.A.

16. Federal Civil Procedure ⇐172

Party seeking class certification has the burden of demonstrating that the action is properly maintainable as a class action. Fed.Rules Civ.Proc.Rule 23(a), (b)(3), 28 U.S.C.A.

17. Federal Civil Procedure ⇐184

In action by employees against employers for breach of collective bargaining agreement and against union local for breach of the duty of fair representation, a class defined as all casual employees who were not paid an additional 50¢ per hour in lieu of health and welfare insurance coverage by employers would be certified. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; Fed.Rules Civ. Proc.Rule 23(a), (b)(3), 28 U.S.C.A.

18. Federal Civil Procedure ⇐8

Employees' action against employers for breach of collective bargaining agreement and against union local for breach of

the duty of fair representation would be consolidated with another case that was nearly identical except for a different named plaintiff and additional defendants, despite the district court's suspicion that the other case was filed to sidestep discovery orders and avoid the need to request leave to add defendants in the first case.

B. Ervin Brown, II, Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, Winston-Salem, N.C., and Beverly C. Moore, Jr., of Law Offices of Beverly C. Moore, Jr., Washington, D.C., for plaintiffs.

Wayne H. Foushee and Claude M. Hamrick, Legal Dept., William D. Spry, Jr., Allman, Spry, Humphreys & Armentrout, Winston-Salem, N.C., Melvin R. Manning, McCaul, Grigsby & Pearsall, Richmond, Va., and Norman B. Smith, Smith, Patterson, Follin, Curtis, James & Harkavy, Greensboro, N.C., for defendants.

MEMORANDUM OPINION AND ORDER

HIRAM H. WARD, Chief Judge.

This is an action by plaintiffs,[1] Billy G. Chambers, Jr. and John William Angell, Jr., against their employers for breach of their collective bargaining agreement and against their union local for breach of the duty of fair representation. 29 U.S.C. § 185. It is before the Court for ruling on numerous motions filed by the various parties. Those motions and the order in which the Court will discuss them are listed below:

(1) Plaintiffs' motions to amend, Fed.R.Civ.P. 15(a);

(2) Plaintiffs' motions to strike affidavits and to offer the deposition of Robert T. Flynn (hereinafter Flynn Deposition) taken in the case of *Overton v. McLean Trucking Co.*, C-80-381-WS (M.D.N.C. May 18, 1981), into evidence;

(3) Plaintiffs' motion for partial summary judgment and amended motion for partial summary judgment, Fed.R.Civ.P. 56, and defendants' motions to dismiss or, in the alternative, for summary judgment, Fed.R.Civ.P. 12(b)(6) & 56;

(4) Plaintiffs' motions for extension of time to move for class certification and for class certification and defendants' motions for denial of class certification, Fed.R.Civ.P. 23;

(5) Plaintiffs' motion to compel discovery, Fed.R.Civ.P. 37(a);

(6) Plaintiffs' motions to consolidate this case with *Overton v. McLean* and for leave to file a consolidated amended complaint.

Motions to Amend

[1] Plaintiffs seek to amend their complaint to alter the dates during which they allege defendant companies, McLean Trucking Co., Inc. (McLean) and Spector Freight Systems, Inc. (Spector) breached their agreement and to particularize the alleged breach of the duty of fair representation by International Brotherhood of Teamsters, Local Union No. 391 (Local 391). They also wish to request compensatory and punitive damages from Local 391. Punitive damages are not recoverable in this action. *IBEW v. Foust*, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). Therefore, the Court will deny plaintiffs' request concerning punitive damages as frivolous. 6 C. Wright & A. Miller, *Federal Practice & Procedure* § 1487 (1971). It will also deny the rest of plaintiffs' request in light of its decision to allow plaintiffs to file their proposed consolidated complaint.

Motions Concerning Materials in Support of Summary Judgment

[2] Plaintiffs contend that much of the information contained in three of the affidavits submitted by defendants is not within the personal knowledge of the affiants. These affidavits include those of R. Larry Wert, William G. McIntyre and W.C. Barbee (April 17, 1980) (hereafter Wert, McIntyre & Barbee Affidavits). Wert, assistant to the employer chairman of the National

1. The two named plaintiffs purport to sue on behalf of a class. In this Memorandum Opinion and Order, the Court will refer to only the two persons named as *plaintiffs*.

Negotiating Committee and the National Grievance Committee,[2] set forth in his affidavit matters with which he became familiar or in which he actually participated because of his position on the national level as well as matters which occurred on local bargaining and grievance levels with which he probably had no firsthand knowledge. Most all of those latter matters, however, are documented by other evidence in the file. McIntyre, employer chairman of the National Negotiating Committee and the National Grievance Committee, substantiated Wert's version of the proceedings and intentions of those committees, matters with which McIntyre is intimately knowledgeable. Barbee, former president of Joint Council No. 9, comprising Teamsters locals in North and South Carolina, union chairman of the Carolina Bi-State Grievance Committee, and member of the Carolina Supplemental Negotiating Committee, stated matters concerning the activities of those two committees but gave only his understanding of events which occurred elsewhere. In deciding the motions for summary judgment, the Court will only consider statements which these affiants have made based on their knowledge gained through their positions. It will not strike those affidavits in their entirety merely because they contain a few statements as to the affiants' understandings rather than knowledge.

Plaintiffs ask the Court to allow them to use the Flynn Deposition in evidence in this case although it was taken in a companion case. The Court suspects that plaintiffs filed the companion case to, *inter alia*, allow them to continue with discovery which had ended in this case. If defendants had presented the Court with the chance, it might have prevented the taking of the Flynn Deposition absent a showing which required reopening of discovery in this case. Nevertheless, the Court feels it should consider that deposition for purposes of the parties' summary judgment motions because the deposition represents evidence which plaintiffs likely could develop at trial. In any event, the Court is going to consolidate this case with *Overton* and allow use of materials in both cases jointly. The Court, therefore, will grant plaintiffs' motion to that extent.

Summary Judgment Motions

[3] Because the Court has received and considered matters outside the pleadings with reference to defendants' motions to dismiss or, in the alternative, for summary judgment, it will treat those motions purely as ones for summary judgment. Fed.R.Civ.P. 12(b); *George v. Kay*, 632 F.2d 1103, 1106 (4th Cir.1980) (no need to give notice and opportunity to file responsive materials); *Plante v. Shivar*, 540 F.2d 1233, 1235 (4th Cir.1976); *Blanks v. Register*, 493 F.2d 697, 699 (4th Cir.1974) *cert. denied*, 419 U.S. 841, 95 S.Ct. 72, 42 L.Ed.2d 68 (1974) (oral notice at hearing).

[4] That both sides to a case have moved for summary judgment does not change the normal standards for judging such motions. It does not establish the absence of genuine issues of fact or require the Court to grant judgment to one side or the other. The Court must consider each motion separately to see if no genuine issue of material fact exists. Neither side concedes the truthfulness of its adversaries' evidence other than for the purposes of its own motion. The nonmoving side as to each motion is entitled to all inferences which may arise from the evidence. In the ultimate analysis, the Court may deny judgment to all parties if warranted. *LewRon Television, Inc. v. D.H. Overmyer Leasing Co.*, 401 F.2d 689 (4th Cir.1968), *cert. denied*, 393 U.S. 1083, 89 S.Ct. 866, 21 L.Ed.2d 776 (1969); *Cram v. Sun Insurance Office, Ltd.*, 375 F.2d 670, 673–74 (4th Cir.1967); *American Fidelity & Casualty Co. v. London & Edinburgh Insurance Co.*, 354 F.2d 214 (4th Cir.1965); 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2720 (1973).

During times relevant to this suit plaintiffs were represented by Local 391. Chambers worked for McLean and Angell worked

2. See the discussion of the parties' summary judgment motions, *infra*, pp. 1338–1345, concerning various negotiating and grievance committees.

for both McLean and Spector as casual employees. They and the other members of their purported class worked under the National Master Freight Agreement in effect from April 1, 1976, to March 31, 1979 (NMFA), Barbee Affidavit Exhibit C. Neither a Spector or McLean group health insurance program covered their casual employees during May 30, 1976, through March 31, 1979. The casual employees were not allowed to participate in the Teamsters Central States Health and Welfare Fund. Deposition of James B. Goff pp. 9 & 16 (March 12, 1980) (hereafter Goff Deposition); Deposition of Robert S. Bell p. 23 (March 12, 1980) (hereafter Bell Deposition).

Article 53 of the Carolina Freight Council City Cartage Supplemental Agreement (Supplemental Agreement) to the NMFA provided in part as follows:

> Effective May 30, 1976, the Employer shall pay casual employees 50¢ per hour, in addition to the hourly rate, for time worked, not to exceed $4.00 per day so as to provide their own health and welfare insurance coverage. This payment shall not be subject to overtime, and shall not be required if the health and welfare contributions established by the Supplemental Agreement (weekly, etc.) have been paid on his behalf, or if health insurance is provided as interpreted by the National Committee.

Spector paid the 50 cents per hour only to those casual employees who specifically requested it. Goff Deposition p. 15. Spector employed 236 casuals within the jurisdiction of Local 391, Goff Deposition p. 13; only 31 of the casuals employed in all of North and South Carolina, which includes several other locals, requested payment. Goff Deposition p. 15. Until January 17, 1977, McLean paid only preferential casuals, Supplemental Agreement Article 59, Sec. 12, the additional amount.[3] Only 11 persons within North and South Carolina fit within this category. Bell Deposition pp. 17-19. McLean employed 753 casuals within the jurisdiction of Local 391. McLean's Response to Plaintiffs' Second Request to Produce (January 21, 1980). On January 17, 1977, McLean began to pay 50 cents per hour to all North and South Carolina casuals but did not pay them retroactively. Bell Deposition p. 17. Plaintiffs seek to recover 50 cents per hour payments for times during which they worked while the Supplemental Agreement was in effect and they were not paid the 50 cents.

Joseph Ellen, a preferential casual at McLean, claims that he submitted a complaint to Local 391 on behalf of all casuals not receiving the 50 cents per hour within 10 days of May 30, 1976, when the 50-cent provision became effective. He contends he first gave his complaint to a Mr. Britt, a shop steward, who refused it. He alleges that George Williams, another shop steward, later accepted his complaint but that he never heard anything concerning it again. Affidavit of Joseph Ellen (May 30, 1980). Curiously, as stated previously, the preferential casuals, including Ellen, began receiving 50 cents per hour extra soon thereafter. Williams has stated that Ellen could have given him a complaint but he does not recall Ellen doing so. He is fairly certain that the procedures he customarily used would have prevented loss of a complaint. Deposition of George W. Williams, Jr. pp. 6-9 (February 19, 1980). No evidence suggests that Ellen ever inquired further about his complaint. This evidence concerning Ellen's alleged complaint creates an issue of fact which the Court cannot settle. Viewing the evidence in a light most favorable to plaintiffs leads to the conclusion that Ellen tendered a complaint which the union failed to process as a grievance. Giving defendants all favorable inferences raises the possibility that Ellen never tendered the complaint. In any event, the credibility of Ellen is crucial on this point. 10 C. Wright & A. Miller, *Federal Practice & Procedure* § 2726 (1973). As discussed at p. 1345 *infra*, this

3. McLean awarded the preferred casuals the payments effective July 1, 1976. Bell Deposition p. 20.

genuine issue is not material to anyone but Eller.

On June 22, 1976, Local 391, pursuant to employee complaints, filed a grievance against Roadway Express (Roadway) on behalf of casual employees at Roadway concerning the 50-cent provision. It filed similar grievances on the dates set forth below:

1.	Branch Motor Express (Branch)	June 21, 1976
2.	Pilot Freight Carriers, Inc. (Kernersville, N.C.) (Pilot)	July 21, 1976
3.	Pilot Freight Carriers, Inc. (Laurinburg, N.C.) (Pilot)	July 21, 1976

Deposition of Charles S. Williams pp. 24–26 & Exhibits Q, R, S & T (February 19, 1980) (hereafter C. Williams Deposition).

Articles 43 and 44 of the Supplemental Agreement in conjunction with Articles 7 and 8 of the NMFA established a grievance machinery. In situations like the 50-cent dispute, the grievance process could proceed to the next step only if the prior step resulted in a deadlock. A majority decision reached at any step was final and binding. The Roadway grievance was deadlocked at the first two steps in the process—the local Carolina Bi-State Grievance Committee and the regional Eastern Conference Grievance Committee. Barbee Affidavit Exhibit B. When it reached the final step—the National Grievance Committee—that committee, rather than decide the specific grievance, issued guidelines concerning payment of the 50 cents per hour. Those guidelines, provided:

1. Fifty cents (50¢) per hour, up to a maximum of ($4.00) per day Health & Welfare contribution, is to be paid each part-time/casual employee who works in a job classification covered under the Virginia or Carolina Cartage Supplements.

2. An employer must determine before employing a part-time/casual employee if that employee has current Health & Welfare coverage.

3. There shall be the following exclusion to the above guidelines: No 50¢ per hour payments in lieu of Health & Welfare coverage shall be required if the part-time/casual employee in question is covered for the time worked under a Health & Welfare plan established by the Supplemental Cartage Agreement.

4. If a part-time/casual employee has a dispute over the failure, on the part of his employer, to comply with the above, that dispute shall be subject to the grievance procedure for final determination.

5. Any dispute or grievance for Health & Welfare payments of individual part-time/casual employees should be handled using the above stated guidelines. Based on the guidelines, the employer shall pay the part-time/casual employees who filed grievances in Case No. N-3-77-E2 (Local 391 vs. Roadway).

6. Any grievance on hand/file as of March 10, 1977, should be handled using the above stated guidelines.

Wert Affidavit Exhibit B.

Subsequent to promulgation and distribution of the guidelines, the other three cases reached the Carolina Bi-State Grievance Committee and were deadlocked both there and before the Eastern Conference Grievance Committee. The companies raised procedural questions. Barbee Affidavit Exhibits D, E & F. All four cases were settled pursuant to the guidelines in September 1977. Flynn Deposition Exhibits 12B–E. Casual workers involved were to be paid retroactively, beginning on the effective date of the Supplemental Agreement, if they qualified under the guidelines. Local 391 received the guidelines on April 4, 1977, and posted copies at all terminals within its jurisdiction two or three days thereafter. Durham Deposition pp. 34–35 & 42.

After learning of the guidelines, R.V. Durham, president of Local 391, sought to verify his understanding of the guidelines through Robert T. Flynn, executive assistant to the director of the Eastern Conference. Durham Deposition pp. 23–24; Flynn Deposition Exhibits 2, 3, 9, 10 & 14. On May 2, 1977, Flynn telegraphed Durham the following statements.

REFERENCE IS MADE TO YOUR LETTER OF APRIL 20, 1977, CONCERNING THE GUIDELINES FOR HEALTH AND WELFARE PAYMENTS FOR PART-TIME/CASUAL EMPLOYEES.

ANY GRIEVANCE THAT WAS NOT FILED BY THE UNION AND IN THE HANDS OF THE EMPLOYER PRIOR TO MARCH 10, 1977 WILL NOT BE HONORED. ANY GRIEVANCE WHICH WAS FILED PRIOR TO MARCH 10, 1977 MUST BE HONORED. ARTICLE 7 OF THE NATIONAL AGREEMENT PROVIDES THAT "AUTHORIZED REPRESENTATIVES OF THE UNION MAY FILE GRIEVANCES ALLEGING VIOLATION OF THE AGREEMENT UNDER LOCAL GRIEVANCE PROCEDURE OR AS PROVIDED HEREIN." ACCORDINGLY LOCAL 391'S GRIEVANCE AGAINST PILOT FREIGHT CARRIERS FILED JULY 21 1976 ON BEHALF OF EMPLOYEES AFFECTED APPEARS TO BE A VALID GRIEVANCE. THE EMPLOYER SHOULD MAKE THE NECESSARY RECORDS AVAILABLE TO THE UNION UPON REQUEST TO DETERMINE THE MONIES DUE AND OWING UNDER THIS GRIEVANCE[4]

Durham Deposition Exhibit M; Flynn Deposition Exhibit 5 (emphasis in original).

On May 23, 1977, two McLean employees, D.B. Tesh and David L. Walser, submitted a complaint to Local 391, on behalf of named casuals seeking the 50 cents per hour from May 30, 1976, through January 17, 1977, when McLean began to pay voluntarily. Chambers was one of those named casuals. The Local 391 business agent for their terminal, Charles Williams, processed that complaint as a grievance. C. Williams Deposition pp. 21 & 36 & Exhibit H. At the Carolina Bi-State Grievance Committee hearing on that grievance, a copy of Flynn's May 2, 1977, telegram was put into evidence. The claim of the casual employees was denied by that committee on October 13, 1977. Barbee Affidavit Exhibit G; C. Williams Deposition Exhibit G. On March 8, 1978, Angell tendered complaints on behalf of all similarly situated casuals at McLean and Spector to Williams. C. Williams Deposition Exhibits E & K. Williams did not process the complaint against McLean because Angell was similarly situated with those casuals named in the May 1977 grievance. C. Williams Deposition pp. 26–29. He gave the Spector complaint to the business agent serving Spector employees. That agent did not file a grievance. Rather, that agent settled with the company on the basis that Angell would be paid for time he had worked within ten days of filing the complaint. C. Williams Deposition pp. 30–33. Angell had not worked for Spector during that 10-day period. Goff Deposition p. 28.

Two or three similar complaints were filed with Local 28, International Brotherhood of Teamsters (Local 28), against Spector in South Carolina before March 10, 1977. Others were filed after that date. James Goff, director of Labor Relations for Spector had Spector to pay retroactively those employees who filed pre-March 10 complaints. Goff Deposition pp. 18–26. On May 27, 1977, Local 28 filed a grievance on behalf of those casuals at Spector who had complained about not receiving 50-cent payments. The Carolina Bi-State Grievance Committee on November 8, 1977, instructed Spector to pay the claimants 50 cents per hour for hours worked 10 days prior to the filing of the respective complaints. Barbee Affidavit Exhibit H.

Plaintiffs allege that union breaches of the duty of fair representation occurred in two manners. First, they contend the grievance procedure was improperly influenced by their union as reflected in the allegedly erroneous Flynn telegram which interpreted the National Grievance Committee guidelines. This influence, they allege, was the culmination of collusion between the companies and union entities to defeat employees' claims. Second, they contend that Local 391 and, for class action purposes, other locals in North and South Carolina should have filed grievances against McLean and Spector before March 10, 1977, on behalf of all casuals.

4. Durham's inquiry which resulted in Flynn's telegram concerned Pilot's failure to comply with Durham's interpretation of the guidelines. Flynn Deposition Exhibit 9.

[5] Before discussing the merits of plaintiffs' claims, the Court must address defendants' statute of limitations defense. The Court concludes that plaintiffs' claim that Local 391 and higher level Teamsters entities breached their duty of fair representation in a manner which caused the Carolina Bi-State Grievance Committee to deny the 1977 grievance against McLean is time-barred by N.C.Gen.Stat. § 1-567.13(b) (Cum.Supp.1979). *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) (citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975)); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966); *Sine v. Local 922, IBT*, 644 F.2d 997 (4th Cir.1981). That North Carolina 90-day period of limitation is the most analogous state statute. Applying it reasonably to this case, the Court does not believe that it requires extending plaintiffs' time for filing suit into 1979. Nevertheless, as an alternative, the Court will address the merits of plaintiffs' claim concerning the allegedly tainted grievance proceeding. Any recovery based on union breaches other than failure to file grievances before March 10, 1977, would require overturning that grievance decision.

[6] Plaintiffs' claim that locals should have grieved against McLean and Spector before March 10, 1977, is not time-barred. An allegation that a union refused to file a requested grievance or failed to file one on its own initiative when it had a duty to do so does not raise the possibility that the Court would have to vacate a grievance decision. The 90-day limitation of § 1-567.13(b) does not apply. *Howard v. Aluminum Workers*, 589 F.2d 771 (4th Cir.1978), requires that the Court apply North Carolina's three-year limitation period. N.C.Gen. Stat. § 1-52 (Cum.Supp.1979). The three-year period applies whether plaintiffs' claims are construed as arising in contract or tort or by statute. N.C.Gen.Stat. § 1-52(1), (2) & (5). Plaintiffs filed this action within three years of the date the 50-cent provision became effective. Any failure to file a grievance concerning that provision necessarily occurred after that effective date. If plaintiffs could prove Local 391 breached its duty of fair representation in this regard, they also would not be time-barred from proving the companies' breaches.

[7, 8] Turning to the merits of plaintiffs' claims, the Court recognizes that a union breaches its duty of fair representation whenever its conduct is arbitrary, discriminatory or in bad faith. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). A union must at all times conform its conduct to the standards set forth in *Vaca v. Sipes*:

> First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.

Griffin v. UAW, 469 F.2d 181, 183 (4th Cir.1972).

If a union, in collusion with an employer or otherwise, acted so as to create a procedural bar, not provided for in the relevant contract, to the assertion of certain rights by employees, such conduct would surely violate the union's duty. However, the Court concludes as a matter of law that neither Local 391 or any other Teamsters entity did such in this case. Plaintiffs theorize that the Supplemental Agreement allowed employees to complain concerning the 50-cent provision at any time during the effectiveness of the agreement and receive the extra 50 cents back to May 30, 1976, if they qualified. Plaintiffs argue that union and company personnel decided that, to cut off some employees claims after March 10, 1977, employees should receive only 50-cent payments for 10 days prior to the time they filed their complaints. This decision, plaintiffs feel, caused the Carolina Bi-State Grievance Committee, and would have caused any other grievance committee

presented with the question, to refuse payment to complainants more than 10 days retroactive to filing of a complaint.

No doubt exists that, in ruling in October 1977, the Carolina Bi-State Grievance Committee relied on a 10-day limit. The Flynn telegram was placed into evidence. The Committee did not rule as a preliminary matter that the grievance was barred by the 10-day rule which would have ended the hearing without further evidence. Even applying a 10-day rule, it would need to know whether any of the employees had failed to receive the payments within the 10-day period. They had all received payments since January 1977 so the claim was denied. The Committee did not say explicitly that it was applying a 10-day rule, but that is the only logical explanation for its denying the grievance on the evidence presented. Later, in hearing the Local 28 grievance against Spector, the committee ordered Spector to pay those Spector employees for 10 days prior to the filing of their complaints.

[9] Plaintiffs are incorrect, however, in arguing that the union and companies arbitrarily imposed the 10-day rule. Article 44, Sec. 4 of the Supplemental Agreement provided in pertinent part:

> All grievances must be made known to the other party, in writing, within ten (10) days after the reason for such grievance has occurred .... If unable to settle such grievance within a total of twenty (20) days after reason for such grievance has occurred, such grievance must be reduced to writing and submitted to the Employer and Chairmen of the Bi-State Grievance Committee or the complaint will be automatically voided, except where there is a proven violation of wage provisions in this contract. Wage provisions are interpreted to mean .... the hourly rate (including the overtime rate).

The 50-cent provision in question was set forth in Article 53 entitled "Health and Welfare;" the hourly rate of pay is set forth in Article 58 entitled "Wages." Based on these provisions, the time limitations for grievances are susceptible of only one reasonable interpretation—if an employee has a complaint concerning whether he is being paid the wage rate set forth in Article 58, he may lodge that complaint anytime while the contract is in effect; if his complaint concerns health and welfare benefits, including the 50 cents in lieu thereof, he must see that the company receives written notice of his complaint within 10 days after the time the company fails to properly grant the benefits. In other words, the Supplemental Agreement provided that a casual who successfully complained could only receive 50 cents per hour worked for the period beginning 10 days before the company received written notice of the complaint.

This construction of the grievance time limits as applied to the 50-cent provision is also consistent with all the evidence before the Court concerning the intent of the parties in negotiating the 50-cent provision. Wert Affidavit pp. 2–3; McIntyre Affidavit pp. 1–2; Durham Deposition p. 8. The National Negotiating Committee negotiated, at least in principle, items such as general wage rates and health and welfare benefits for casuals for inclusion in various supplemental agreements. That committee transmitted those terms to the supplemental negotiating committees for either verbatim inclusion or negotiation of specific language to implement those items. Wert Affidavit Exhibit A. The directors from the National Negotiating Committee concerning health and welfare benefits for casuals provided:

> *Pension, Health and Welfare for Casuals and Extras.*
>
> If the Supplemental Agreement does not now provide for payments to the Health and Welfare plan established by such Agreement on behalf of casual or extra employees or if health insurance is not provided, then casual or extra employees shall receive 50¢ per hour for time worked, not to exceed $4.00 per day so as to provide their own health and welfare insurance coverage.
>
> This payment shall not be subject to overtime.

A supplemental agreement which provided for contributions to a health and welfare fund on behalf of casuals had no need for incorporation of the 50-cent provision. Treating the 50-cent provision as a wage rate would have led to the incongruous result that a casual working under such an agreement would have no time limit for complaining concerning failure to contribute whereas a casual working under the agreement involved here would have a time limit in which to complain concerning failure to pay 50 cents. Also, an hourly rate of pay would have been subject to overtime. The 50-cent provision was not. Furthermore, the 50-cent provision became effective later than the hourly rate provisions. Contrary to plaintiffs' argument, treatment of the 50 cents per hour by the Internal Revenue Service or any other agency has no bearing on whether the negotiators intended to treat it as a wage or fringe provision for grievance purposes.

The negotiators of the 50-cent provision had some doubt as to which casuals would qualify for payment. Wert Affidavit p. 4; McIntyre Affidavit p. 1; Barbee Affidavit p. 2; Durham Deposition p. 8. Naturally, the union locals and especially the companies which operated under the Supplemental Agreement were even more confused. *E.g.*, Bell Deposition pp. 12–13; Barbee Affidavit Exhibit B. The provision appeared to contemplate that the National Negotiating Committee would further explain what it would require of the companies. The Roadway, Branch and Pilot grievances were so-called "shotgun grievances." Local 391 did not name individual employees but, rather, grieved on behalf of all employees at a particular plant. To this the companies objected. They also objected to the lack of specificity in the grievances and, of course, argued that the 50-cent provision was not a wage rate. Barbee Affidavit Exhibits B, D, E & F. When the Roadway grievance reached the National Grievance Committee, the committee was faced with the union position that all casuals not covered by company health and welfare contributions should receive payments retroactively on one hand and the company procedural objections on the other. The committee's resultant guidelines, although inartfully drawn, reflect a compromise. Because of the ambiguity concerning who was covered by the 50-cent provision, procedural requirements were waived for all grievances filed by March 10, 1977. Some employees covered by such grievances would receive payments back to May 30, 1977, whether they had filed complaints untimely or not even filed complaints at all. Wert Affidavit pp. 6–7; McIntyre Affidavit p. 1. Employees who were not covered by pre-March 10, 1977, grievances have no reason to complain if they failed to attempt to exhaust their remedies under the collective bargaining agreement. *See p. 1345, infra.*

Plaintiffs were not duped by receiving notice of the guidelines after a supposed deadline for filing complaints. The guidelines were posted, first, to inform casuals already covered by grievances to make claims for the specific amount of money due, and, second, to tell other casuals that if they were not receiving proper payment to employ the grievance procedure to begin forcing payment. Durham Affidavit pp. 35–37 & Exhibit Z. Plaintiffs thereafter attempted to employ that procedure. The Carolina Bi-State Grievance Committee's subsequent rulings were consistent with the Supplemental Agreement and the guidelines. The Flynn telegram did not improperly influence that committee.[3] Local 391 had no duty thereafter to press Angell's grievance against McLean. It settled Angell's grievance against Spector in accordance with the Supplemental Agreement and the guidelines.

[10, 11] Plaintiffs' argument that Local 391 should have processed grievances against McLean and Spector either on its own initiative or because of the alleged Ellen complaint runs afoul of a settled principle of labor law. Individuals who sue their employers for breach of a collective

3. By saying post-March 10 grievances should not be honored, Flynn obviously meant they should not be honored for more than 10 day retroactively.

bargaining agreement must first *attempt* exhaustion of remedies under that agreement. When they must do so through their exclusive bargaining representative as required in this case, Supplemental Agreement Article 44, Sec. 1(g), three exceptions to this exhaustion principle might arise: (1) the company might repudiate the agreement; (2) the union might refuse to process a complaint; or (3) to attempt exhaustion might be futile. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563, 96 S.Ct. 1048, 1055, 47 L.Ed.2d 231, 240–41 (1976); *Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969); *Vaca v. Sipes*, 386 U.S. at 184–86, 87 S.Ct. at 913–14, 17 L.Ed.2d at 854–55; *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). The Court is aware of no precedent which requires a union to attempt exhaustion on its own initiative. Quite properly the practice at Local 391 is for an employee to first file a complaint. Durham Deposition pp. 11–12; C. Williams Deposition pp. 7 & 9. No evidence exists that McLean or Spector had repudiated the grievance procedure. Except for their later 1977 and 1978 complaints, plaintiffs had not requested the filing of grievances on their behalf. Futility is the only exception on which they could arguably rely.

[12] Assuming, as the Court must on defendants' summary judgment motions, that Ellen tendered a complaint, no evidence suggests that failure to process that complaint rendered futile a subsequent attempt by plaintiffs. Merely that a steward seemingly failed to follow up on one complaint, without more, is not sufficient. No pattern of refusal to process grievances had developed. *E.g., Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3d Cir.1972); *Gray v. International Association of Heat & Frost Insulators*, 447 F.2d 1118 (6th Cir. 1971). Plaintiffs put forward no reason to feel that union representatives on the grievance panel would discriminate against them. *Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519; *Battle v. Clark Equipment Co.*, 579 F.2d 1338 (7th Cir.1978). In fact, casuals at other companies were successfully pursuing their remedies. Ellen himself might have reason to complain that Local 391 breached its duty to him by not processing his complaint.[6] Plaintiffs might have benefited if Local 391 had turned Ellen's complaint into a grievance on behalf of all casuals at McLean. However, the possibility of this fortuity does not bootstrap plaintiffs into the position of escaping the exhaustion bar. When they did attempt exhaustion their complaints were properly handled in light of the 10-day rule.

[13] Neither Local 391 or another Teamsters entity breached its duty of fairly representing plaintiffs. That conclusion also precludes recovery for breach of contract from McLean or Spector. However, realizing its obligations to first consider class certification, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *Doctor v. Seaboard Coast Line Railroad*, 540 F.2d 699, 707–09 (4th Cir.1976), the Court will not grant defendants summary judgment now. It will deny plaintiff's motion and amended motion.

Class Action Certification

[14] Defendants have raised objections to class certification based, *inter alia*, on plaintiffs' failure to timely move for certification. The Court will not, however, place the burden of this default on the class which plaintiffs purport to represent. Defendants were not prejudiced by the delay. It will extend the time for requesting class certification to the day plaintiffs filed their request and will rule on that request.

Plaintiffs request that the Court certify a class under Fed.R.Civ.P. 23(b)(3) defined as

> all casuals employed in North or South Carolina who (a) were not paid the additional $.50 per hour, with a maximum of $4.00 per day, called for by Article 53 of the Carolina Freight Council City Cartage Supplemental Agreement (1) by defendant Spector at any time during the

6. Yet, he was ultimately paid as a preferential.

period May 30, 1976 until March 31, 1979 or (2) by defendant McLean at any time during the period May 30, 1976 until January 17, 1977 and (b) for whom no employer made health and welfare contributions during the period of nonpayment of the additional $.50 per hour pursuant to said Supplemental Agreement.

[15, 16] Assuming as it must for certification purposes that plaintiffs' claims have merit, the Court may preliminarily look at the evidence presented to see if a class action is properly maintainable. *Doctor v. Seaboard Coast Line*, 540 F.2d at 707–09. Plaintiffs have the burden of demonstrating that this action is properly maintainable as a class action. *Doctor v. Seaboard Coast Line*, 540 F.2d at 706; *Carracter v. Morgan*, 491 F.2d 458, 459 (4th Cir.1973); *Poindexter v. Teubert*, 462 F.2d 1096, 1097 (4th Cir. 1972). Here, the prerequisites of Fed.R. Civ.P. 23(a) & (b)(3) are clearly met for a class of lesser scope than that which plaintiffs seek.

Plaintiffs have not developed evidence of attempts to exhaust collective bargaining agreement remedies before March 10, 1977, as to locals besides Local 391. Evidence as to the knowledge of representatives of other locals of McLean's or Spector's failure to pay is not developed. Merely within Local 391 the class is so numerous that joinder is impracticable. As to imposition of an improper filing deadline, common questions of law and fact exist for all casuals in North and South Carolina. However, depending upon efforts of casuals at other locals to exhaust the grievance procedure in 1976 or early 1977, the questions of exhaustion and futility for them may differ from those posed by casuals represented by Local 391.[7] The same distinction applies to the typicality of claims. Defendants question whether plaintiffs would fairly and adequately represent even casuals within the jurisdiction of Local 391. Defendants' reservations are well taken. Yet, from all appearances from the file, plaintiffs through their attorneys are vigorously pursuing this action on behalf of the entire purported class as well as themselves.

Finally, the Court finds that questions of law and fact concerning Local 391's failure to process grievances and unfair union influence at Carolina Bi-State Grievance proceedings predominate over questions affecting only individual casuals represented by Local 391. The Court has insufficient evidence to make that determination for other locals. If for no other reason, the small size of each individual's stake in this matter makes a class action superior to individual suits. Class members should have no great interest in separately controlling the handling of their claims. The Court is aware of no prior action concerning this controversy. The existence of employment records should foster easy management of class matters.

[17] Therefore, the Court will certify a class defined as

> all casuals represented by Local 391(a) who were not paid the additional 50 cents per hour, with a maximum of $4.00 per day, as required by Article 53 of the Carolina Freight Council City Cartage Supplemental Agreement (1) by defendant Spector at any time during the period May 30, 1976, until March 31, 1979, or (2) by defendant McLean at any time during the period May 30, 1976, until January 17, 1977, and (b) for whom no employer made health and welfare contributions during the period of nonpayment of the additional 50 cents per hour pursuant to said Supplemental Agreement.

Plaintiffs' Motion to Compel Discovery

Plaintiffs seek to make the companies disclose the number of casual workers in all of North and South Carolina. The ruling on class certification obviates the need for this discovery. The Court will deny plaintiffs' motion.

7. The record contains some scant evidence of pre-March 10, 1977, complaints at Local 28. However, without fuller exploration of those complaints, the Court cannot discern whether questions common to Local 391 casuals exist as to those represented by Local 28.

Consolidation

[18] Plaintiffs seek consolidation of this case with *Overton v. McLean* and permission to file a consolidated complaint. As discussed in an Order, filed in that case contemporaneously herewith, that case is nearly identical to this one except for a different named plaintiff and additional defendants. Therefore, the Court will grant plaintiffs' motion despite the suspicion that *Overton v. McLean* was filed to side step discovery orders and avoid the need to request leave to add defendants in this case. It will also allow plaintiffs to file their proposed consolidated complaint. That complaint contains nothing new which would prejudice defendants.

IT IS, THEREFORE, ORDERED that the following motions be, and the same hereby are, DENIED:

(1) Plaintiffs' motions to amend;

(2) Plaintiffs' motions to strike affidavits;

(3) Plaintiffs' motion and amended motion for partial summary judgment;

(4) Defendants' motions for denial of class certification; and

(5) Plaintiffs' motion to compel discovery.

IT IS FURTHER ORDERED that the following motions be, and the same hereby are, GRANTED:

(1) Plaintiffs' motion to offer into evidence the Flynn Deposition for purposes of the motions considered herein; and

(2) Plaintiffs' motion for extension of time to move for class certification.

IT IS FURTHER ORDERED that plaintiffs' motions to consolidate and to file a consolidated complaint be, and the same hereby are, GRANTED. This action hereby is consolidated with *Overton v. McLean Trucking Co.*, C-80-381-WS. Let the Clerk file plaintiff's proposed consolidated complaint this date and all future matters concerning these consolidated cases in the file numbered C-79-388-WS.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification be, and the same hereby is, GRANTED to the extent defined herein. Counsel for the parties shall confer and, within twenty (20) days of the date of this Memorandum Opinion and Order, submit a proposed notice and plan for notification of class members[8] at plaintiffs' expense pursuant to Fed.R.Civ.P. 23(c)(2).

IT IS FURTHER ORDERED that ruling on defendants' motions for summary judgment be, and the same hereby is, STAYED pending completion of the class notification procedure.

ORDER OF DISMISSAL

On September 25, 1981, the Court consolidated these cases and ruled that they should proceed as a class action. The Court considered the parties' cross motions for summary judgment and indicated that it would grant the defendants' motions and dismiss the consolidated action, but stayed final ruling pending completion of class certification. After consultation with the parties, the Clerk, on January 6, 1982, mailed class action notices to all potential class members identified by the parties. Notice of Class Action & Certificate of Mailing (January 6, 1982). The case file contains exclusion requests from 35 persons. The Clerk has filed his certificate indicating that 29.38% of all notices have been returned as undeliverable. All parties have indicated satisfaction with the method of notifying class members and request no further notification effort by the parties or the Court. *See* Letters rec'd February 12, 16, 23 & March 1, 1982. Class certification and notification of class members has now been completed.

IT IS, THEREFORE, ORDERED that the stay entered in these cases on September 25, 1981, be, and the same hereby is, VACATED. IT IS FURTHER ORDERED that, based upon the reasoning contained in the Court's Memorandum Opinion and Order dated September 25, 1981, the defend-

8. The *Manual for Complex Litigation*, Part 1, § 1.45 and Part 2, § 1.45 may be of assistance to counsel in preparation of the proposed notice to members of the class.

ants' Motions for Summary Judgment be, and the same hereby are, GRANTED and these actions hereby are DISMISSED.

Dorothy ELLENDER, Angela Zanski, James Trowbridge, Lois V. Brunjes, and Verley Smith, individually and on behalf of all others similarly situated, Plaintiffs,

v.

Richard S. SCHWEIKER, Secretary of the Department of Health and Human Services, and John A. Svahn, Commissioner of the Social Security Administration, Defendants.

No. 82 Civ. 4816 (IBC).

United States District Court, S.D. New York.

Oct. 26, 1982.

In action by social security benefit recipients to enjoin recovery of overpayments of benefits and withholding of future benefits, recipients sought preliminary injunctive relief and class certification, and other recipients moved to intervene. The District Court, Irving Ben Cooper, J., held that: (1) compensatory damages and return of any unlawfully withheld benefits could be ordered, but punitive damages could not be awarded; (2) injunctive relief was appropriate; (3) prospective intervening plaintiffs presented questions of fact and law virtually identical to those of original plaintiffs; and (4) class certification was appropriate.

Applications for preliminary injunction, intervention and class certification granted.

1. Civil Rights ⇐13.17

Compensatory damages can be awarded in actions, such as one to enjoin Secretary of Department of Health and Human Services and Commissioner of Social Security Administration from recovering alleged overpayments of social security benefits and withholding future benefits, when constitutional violations are alleged.

2. Social Security and Public Welfare ⇐175

If withholding of social security supplemental security income benefits or benefits under old age survivors and disability program to recover prior overpayments of such benefits were unlawful, appropriate remedy would be to order return of any such monies.

3. Damages ⇐91(1)

Punitive damages could not be awarded in action to enjoin Secretary of Department of Health and Human Services and Commissioner of Social Security Administration from recovering overpayments of social security benefits and withholding of future benefits. 28 U.S.C.A. § 2674.

4. Injunction ⇐136(3), 137(4)

Social security benefit recipients who sought to enjoin recovery of alleged overpayment of benefits and withholding of future benefits were in danger of real and imminent loss of basic necessities imperative for continuation of human existence and showed sufficiently serious questions going to merits to make them fair ground for litigation and balance of hardships tipping decidely toward them so as to warrant injunctive relief.

5. Federal Courts ⇐13

Plaintiffs and intervenors in action to enjoin recovery of alleged overpayment of social security benefits and withholding of future benefits shared emotional harm allegedly caused by Social Security Administration's coercive debt collection practices, which constituted sufficient injury in fact to satisfy standing requirements of Article III of Constitution. U.S.C.A. Const. Art. 3, § 1 et seq.

6. Federal Civil Procedure ⇐172

It is unnecessary for plaintiffs to allege precise number of plaintiffs to be included

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1253

Billy G. Chambers, Jr. and John William Angel, Jr., on behalf of themselves and all other persons similarly situated and Larry Overton, on behalf of himself and all other persons similarly situated, Appellants,

-versus-

McLean Trucking Company, Spector Red Ball, Inc., International Brotherhood of Teamsters, Local Union. No. 391, International Brotherhood of Teamsters, Joint Council No. 9 International Brotherhood of Teamsters, Eastern Conference W. C. Barbee, President Emeritus of IBT, Joint Council No. 9, Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem.
Hiram H. Ward, District Judge

Argued: November 10, 1982.
Decided: February 2, 1983.

Before RUSSELL, PHILLIPS and SPROUSE, Circuit Judges.

B. Ervin Brown, II (Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown on brief) and Beverly C. Moore, Jr., for Appellants; Norman B. Smith (Smith, Patterson, Follin, Curtis, James & Harkavy on brief) and Melvin R. Manning (F. William Kirby, Jr., McCaul, Grigsby and Pearsall on brief) and Jonathan Axelrod (Hugh J. Beins, Beins, Axelrod & Osborne, P.C.; Claude Hamrick on brief) for Appellees.

PER CURIAM:

The plaintiffs, employees of the defendant trucking companies and members of the Teamsters' Union, appeal from the district court's grant of the defendants' motion for summary judgment in their suit against their employers for breach of their collective bargaining agreement and against several entities of the Teamsters' Union for breach of

their duty of fair representation. The gravamen of the plaintiffs' complaint is that the defendant employers and union entities conspired to deprive them of certain hourly payments granted them by the collective bargaining agreement in lieu of health and welfare insurance. Finding no support for this claim and no issues of material fact, we affirm the judgment of the district court on the reasoning of the district court. Chambers v. McLean Trucking Co., No. C-79-388-WS (M.D.N.C., Sept. 25, 1981).

AFFIRMED.

NATIONAL GRIEVANCE COMMITTEE
GUIDELINES FOR HEALTH & WELFARE PAYMENTS FOR
PART-TIME/CASUAL EMPLOYEES COVERED UNDER
THE VIRGINIA FREIGHT COUNCIL AND CAROLINA
FREIGHT COUNCIL SUPPLEMENTAL CARTAGE AGREEMENTS

The following guidelines are:

1. Fifty cents (50¢) per hour, up to a maximum of ($4.00) per day Health & Welfare contribution, is to be paid each part-time/casual employee who works in a job classification covered under the Virginia or Carolina Cartage Supplements.

2. An employer must determine before employing a part-time/casual employee if that employee has current Health & Welfare coverage.

3. There shall be the following exclusion to the above guidelines: No 50¢ per hour payments in lieu of Health & Welfare coverage shall be required if the part-time/casual employee in question is covered for the time worked under a Health & Welfare plan established by the Supplemental Cartage

Agreement.

4. If a part-time/casual employee has a dispute over the failure, on the part of his employer, to comply with the above, that dispute shall be subject to the grievance procedure for final determination.

5. Any dispute or grievance for Health & Welfare payments of individual part-time/casual employees should be handled using the above stated guidelines. Based on the guidelines, the employer shall pay the part-time/casual employees who filed grievances in Case No. N-3-77-E2 (Local 391 vs. Roadway).

6. Any grievance on hand/file as of March 10, 1977, should be handled using the above stated guidelines.

The Union shall post a notice, which shall remain posted for thirty calendar days, allowing all part-time employees who have not been paid the $.50 (fifty cents) per hour as provided in Article 53 to make a written claim

for any unpaid monies due. The Company shall provide the records necessary to establish monies have been paid or are due the employees who have made a claim.

This is in settlement of the deadlocked grievances involving Local 391 vs. Roadway Express, Pilot Freight Carriers, and Branch Motor Express.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

BILLY G. CHAMBERS, JR., and JOHN WILLIAM ANGEL, JR., on behalf of themselves and all other persons similarly situated, Plaintiffs	:	
v.	:	C-79-388-WS
McLEAN TRUCKING COMPANY, INC., SPECTOR FREIGHT SYSTEMS, INC. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 391, Defendants	:	

MEMORANDUM AND ORDER

This matter came before the Court on May 26, 1981, for hearing upon the parties' various pending motions. Realizing that the parties' cross-motions for summary judgment could settle at least the liability issue and having again reviewed the parties' motions, briefs, arguments and evidence, the Court has formed

preliminary conclusions on the various issues presented. Therefore, it will briefly outline those conclusions and then direct the parties to submit memoranda in the form of proposed judicial opinions ruling on the summary judgment motions. The Court sets forth its preliminary conclusions solely to indentify for the parties the issues on which it desires the most assistance.[1/]

One of the more recent disagreements between the parties in this case concerns the applicable statute of limitations. The law is now settled that when an employee's claim under 29 U.S.C. §185 against his union and employer involves the possible vacation of a grievance or arbitration decision, the Court should apply the most analogous state statute of limitations

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[1/] The Court does not mean that the parties should decline to address any issue on which they believe the Court will agree with them. Rather, the Court merely wishes to give them some guidance and insight into its thinking.

for vacation of arbitration awards. United Parcel Service, Inc. v. Mitchell, ___ U.S. ___, 101 S. Ct. ___, 67 L.Ed.2d 732 (1981). Here, the 90-day period of N.C.Gen.Stat. §1-567.13(b) should apply. Sine v. Local 992, IBT, ___ F.2d ___ (4th Cir. 1981). However, a different period would apply to plaintiffs' duty of fair representation claims where no grievance process was invoked. Sine v. Local 992, ___ F.2d at ___ n.10; Howard v. Aluminum Workers International Union, 589 F.2d 771 (4th Cir. 1978). This action contains both types of claims and requires analysis of the factual chronology in light of the different limitation periods to determine whether any claims are barred.

Plaintiffs allege that Local 391 breached its duty in various ways. They are incorrect, however, if they contend that a union representative sitting on a grievance panel who votes against the employee position breaches a

duty of fair representation. Furthermore, the Court believes that the $.50 provision in lieu of health and welfare benefits is not a wage provision under the applicable bargaining agreement. Thus, grievances concerning it are subject to the 10-day rule for filing. The collective bargaining agreement and the National Grievance Committee guidelines concerning that provision suggest that the named plaintiffs and the purported class no longer have a claim for back payment. However, the Court is troubled by the failure of Local 391 to grieve concerning the $.50 provision before March 10, 1977. If plaintiffs' suit has merit, this failure seems to provide its basis. If Local 391 had filed grievances against McLean and Spector by March 10, 1977, presumably the union and employers would have settled those grievances in the same manner as the other grievances before the National Grievance Committee at that time.

IT IS, THEREFORE, ORDERED that:

Within forty (40) days from the date of this Memorandum and Order, counsel for the defendants will file a joint memorandum setting forth separately each material fact and each legal issue, together with a discussion as to why there are no genuine issues of fact to be tried and the legal conclusions as to why the defendants are entitled to a judgment as a matter of law and the plaintiffs are not entitled to judgment as a matter of law on the issue of liability. Further, by way of textual citation, counsel for the defendants is required to set forth the record references supporting their position as to the facts and references to the law supporting their legal conclusions. Pointedly, the defendants' proposal is to be in the form of a judicial opinion granting their motions and denying plaintiffs' motions.

Also within forty (40) days from the date

of this Memorandum and Order, counsel for plaintiffs will file a similarly drawn memorandum with supporting record references and citations also designedly a proposed entry in the nature of an opinion granting their motions and denying defendants' motions.

The Court emphasizes that it may adopt one or the other of the submitted memoranda in whole or in part or reject both and write an order of its own with or without a memorandum opinion.

Upon the filing of the parties' proposed memoranda, the Court will take under advisement their summary judgment motions as well as all other pending motions in this case and in Overton v. McLean Trucking Co., C-80-381-WS.

s/Hiram H. Ward
United States District Judge

May 27, 1981